

## Creating a Safe & Drug Free Workplace

Employers often use post-offer pre-employment drug tests when hiring new employees as a method to ensure that the employees they hire are not using drugs and bringing the problems associated with drug use to the work environment. However, many employers hesitate to test employees after they are hired because of the risk of litigation for failure to accommodate, discrimination, retaliation, among other claims, under the American's with Disabilities Act (ADA), 42 USC 12101,d the Elliott-Larsen Civil Rights Act, MCL37.2101. Despite these risks, implementing a drug free workplace policy that includes post-employment drug screens provides the important benefit of maintaining a safe workplace for employees. Provided that the employer adopts a lawful and clear drug free workplace policy, administers it consistently and uniformly, and takes a few common sense precautions, the benefits can outweigh the risks.

### **When should employees be tested?**

Many employers already have a policy requiring prospective employees to submit to a drug test prior to beginning work, but after the offer of employment. Employers must realize, however, that such testing is only one component of an effective drug free workplace policy. Drug screening can be extended to current employees using several different types of screening policies.

### **Who should be tested?**

Whatever drug screening policy is chosen, it is imperative that the policy is enforced uniformly and consistently. When testing prospective employees after the offer, employers should require *all* individuals who have been given an offer to submit to a drug screen. When an employer requires post-accident drug screens, any employee involved in a workplace accident should be tested for drugs and alcohol. Further, employers should not limit screening to the rank-and-file employees, but should also screen managers and supervisors. If drug screening is supposed to be random, set up a system for choosing who is to be tested that is actually random, such as a lottery. Employers who pick and choose which individuals or groups they will test expose themselves to liability under discrimination statutes.

### **How do employers limit their liability?**

While drug testing programs offer numerous benefits, such as creating a safer work place and helping employers control workers' compensation costs, employers should take the appropriate steps to limit their risk of liability. One way to limit liability is to implement the policy uniformly and consistently; however, there are other steps an employer can take to limit its liability:

- Develop a clear, written drug free work place policy. The policy should include a clear statement prohibiting the manufacture, use, and distribution of drugs and alcohol in the workplace. It should also inform employees that they must submit to drug screens and explain when and how specimens will be collected.
- Articulate clear consequences for violating the drug free work place policy.
- Provide all potential and current employees with a printed copy of the drug free workplace policy.
- Inform current employees that continued employment is conditioned upon compliance with the drug free workplace policy, including submitting to and passing drug screens.
- Obtain a waiver prior to administration of a drug screen. The waiver should inform the individual that employment is conditioned upon passing the drug screen and give the individual the opportunity to disclose any medications that may produce a false negative.
- Thoroughly investigate the company retained to provide drug screens to ensure that the company is reputable, has high standards for confidentiality, and uses proven screening methods.
- Handle potential policy violations confidentially and professionally.

A drug free workplace policy that includes drug screening is an important component in maintaining workplace safety and reducing potential workers' compensation claims. Employees who are drug and alcohol free are less likely to be involved in workplace accidents, and fewer accidents mean lower workers' compensation premiums. An ounce of prevention before an accident occurs can help employees and employers alike. Additionally, employees who are drug and alcohol free have better attendance records, are more productive, and participate in the creation of a positive work place culture for the employer.

Gregory M. Meihn is a Senior Attorney at Nemeth Burwell, P.C., a law firm that works exclusively with employers to prevent, resolve, and litigate employment disputes. If you would like more information regarding drug testing or any other aspect of employment law, please visit the Firm's website at [www.nemethburwell.com](http://www.nemethburwell.com) or email Gregory Meihn at [gmeihn@nemethburwell.com](mailto:gmeihn@nemethburwell.com).